IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1782

LAWRENCE E. BOWLING,
Petitioner,

v.

DAVID MATHEWS, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
for the Fifth Circuit

BRIEF FOR RESPONDENTS OTHER THAN C. DALLAS SANDS IN OPPOSITION

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STATEMENT OF THE CASE

Petitioner raises a broad range of issues before this Court arising from his discharge as a tenured English professor at the University of Alabama in 1973. The narrowness and unimportance of these issues, however, is demonstrated by the Court of Appeals' notation that only one such issue — petitioner's due process argument — was of sufficient importance to merit discussion in its opinion (A 1 n. 1)*; and by the Court of Appeals' brief determination that respondent, in discharging petitioner, "fully complied" with the due process standards of the Fourteenth Amendment

*The appendix to the petition is referred to herein as "A."

and "meticulously adhered" to applicable procedural safeguards (A 5). Ironically, the degree to which respondents did in fact adhere to such due process safeguards, in terms of the great amounts of time, energy, and resources expended by the University and its officials to provide petitioner with due process in its highest form, is the only factor that makes this case atypical.

Pursuant to a written provision in its Faculty Handbook allowing dismissal of tenured faculty members for "adequate cause," formal dismissal charges were brought against petitioner in April of 1972. Following a two-week hearing by a faculty committee on these charges in June of that year, petitioner's employment was terminated effective August 13, 1973, approximately one year later.

In February of 1973, petitioner filed his first complaint (88 pages in length) alleging that his termination was unconstitutional and asking for damages and reinstatement. The District Court found the faculty hearing to have been deficient in procedural due process and remanded the cause to the University for a rehearing that afforded petitioner due process (A 8). Petitioner appealed from that order of remand which, among others, was affirmed in *Bowling v. Mathews*, 511 F.2d 112 (5th Cir. 1975), the Court of Appeals noting in support of its opinion that the second hearing was accorded by the trial court at petitioner's "own behest" (A 7).

On remand, the District Court, on petitioner's motion, ordered the University to pay to petitioner back pay at a rate equal to his regular salary from the date his pay was terminated and until final determination of his status by the University (A 10). Petitioner was not required to perform any of the duties of a professor, however, pending the rehearing. Thereafter, a new Statement of Charges, consisting of 24 legal-sized pages, was served on petitioner,

which contained allegations that petitioner failed to perform his assigned duties and committed acts inimical to the efficient functioning of the Department of English. As the Fifth Circuit summarized, that document specified "in painstaking detail" the factual basis for each charge, the names of those witnesses expected to testify in support of the charges, and the nature of their expected testimony (A 3).

Beginning in November of 1974, in a series of seven meetings participated in by petitioner and his counsel, a new faculty hearing committee was selected. The committee was chosen from a master list consisting exclusively of full professors with tenure, but excluding those professors with a potential bias toward appellant's cause. Each party was allowed an unlimited number of challenges for cause and two peremptory challenges.

Following the selection of the committee, Dr. Scott, the administrative official of the University designated to preside over the selection and organization of the hearing committee and to assist the committee, issued a detailed memorandum of instructions to the committee (*see* A 4 & n. 5). All parties were provided an opportunity to object to such rules.

Beginning on May 1, 1975, fourteen hearing sessions were held by the committee, with petitioner being ably represented throughout by counsel, Professor Wythe Holt (listed as "of counsel" to petitioner herein). Oral arguments were heard on May 29, 1975. During the course of the hearings, some 12 witnesses were examined, cross-examined, and, on occasion re-examined; the University introduced into evidence 79 exhibits and petitioner introduced 84 exhibits.

Following the conclusion of the hearing, the committee issued a 12-page report finding the charges against peti-

tioner to be supported by substantial evidence and recommending that he be dismissed from his position as a tenured professor.

After considering the committee's report and petitioner's memorandum in opposition thereto, the University accepted the recommendation of the committee and informed petitioner by letter on October 7, 1975, that his employment would be terminated, effective August 15, 1976.

Petitioner appealed to the Board of Trustees of the University which approved the recommendation of the faculty hearing committee in a 46-page report, after consideration of briefs submitted to the Board by petitioner, oral argument before the board by petitioner with counsel, and the entire transcript of the faculty committee.

Thereupon, defendants moved for summary judgment in the District Court, filing in support thereof an exhaustive array of documents consisting of several thousand pages and including the entire transcript of the faculty committee hearings with exhibits, the faculty committee report, and the Board of Trustees' report. After such filing, petitioner filed a "Motion and Brief for Partial Summary Judgment and In Opposition to Defendants' Motion for Summary Judgment." After a "careful examination" of such documents, the District Court granted defendants' motion, concluding that petitioner's termination was "in accordance with constitutional standards" and that the proceedings conducted by the University "fully complied" with the procedural and substantive due process standards required by the Fourteenth Amendment (A 14-15).

The Court of Appeals affirmed the judgment of the District Court, discussing only petitioner's due process argument and, in two footnotes, rejecting his 23 remaining arguments, including his jury trial argument (A 1, n. 1, A 5, n. 7).

ARGUMENT

Mr. Justice Rehnquist stated recently in *Barthuli v. Board of Trustees of Jefferson Elementary School District*, 98 S. Ct. 21, 22 (1977), that:

> The relevant cases of this Court dealing with the due process rights of public employees discharged from their positions are *Board of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed.2d 548 (1972); *Perry v. Sindermann*, 408 U.S. 593, 92 S. Ct. 2513, 33 L. Ed.2d 570 (1972); *Arnett v. Kennedy*, 416 U.S. 134, 94 S. Ct. 1633, 40 L. Ed.2d 15 (1974); and *Bishop v. Wood*, 426 U.S. 341, 96 S. Ct. 2074, 48 L. Ed.2d 684 (1976).

Petitioner neither cites nor discusses any one of these cases in his petition. He asserts no conflict between the decision below and any of the above decisions, no injustice in the decision below in light of such decisions, and no important question of federal law in the context of such decisions.

Petitioner's failure to discuss such cases cited by Mr. Justice Rehnquist should certainly suggest to this Court that the laboriously-constructed conflicts developed by petitioner are bottomed upon artificial inconsistencies extracted from dissimilar lines of cases. The simple truth of the matter is that *Roth*, *Sindermann*, *Arnett*, and *Bishop* make it clear that the decision below is manifestly correct, there is no conflict of decision, and certainly that no important question of federal law is presented by the petition.

I.
THE DECISION BELOW IS CLEARLY CORRECT

An independent review by this Court of the record in this case* would reveal a course of conduct by petitioner,

*Such an independent review would be permissible in such a case where constitutional rights are in issue. *Pickering v. Board of Education*, 391 U.S. 563, 578 n. 2 (1968).

over a period of approximately eight years, of insubordination and failure to perform required duties, which conduct was disruptive to the efficient functioning of the University's Department of English. Contrary to petitioner's allegations, such conduct was not limited to the early periods of his employment but instead was concentrated in the period prior to the bringing of the formal dismissal charges against petitioner in 1972.* Petitioner's acts of misconduct can be grouped into three general areas:

1. Admitted refusals by petitioner to accept duly made class assignments, on the pretext that his contract of employment required only that he teach at higher levels, or solely in the area of Renaissance or Shakespeare.

2. The creation by petitioner of friction with and hostility between himself and two successive chairmen of the Department of English. Petitioner carried on a "running" dispute with both chairmen over every conceivable facet of his employment, including complaints of violations of his contract of employment, course assignments, the amount of his salary, the organization and operation of the Department of English, his teaching loads, the scheduling of his classes, and the classrooms and offices assigned to him, when in fact there was no reasonable basis for any such complaints. Petitioner resorted to both actual and implied threats of physical harm against both chairmen, along with threats of "blackmail" against one

*Petitioner's attempt to avoid responsibility for such conduct by asserting that it occurred in the early period of his tenure at the University and was thereby condoned by failure of the University to warn him of the consequences of the same totally ignores the actual facts in the record that: (1) such conduct occurred throughout petitioner's employment; and (2) numerous discussions were held with petitioner by University officials concerning his conduct over a substantial period prior to his discharge. Formal "warnings" are simply incongruous in an academic setting at the university level.

chairman. Petitioner called one chairman a "liar and a coward" in the presence of the Dean of the College of Arts and Sciences and the University Counsel.

3. Petitioner's ongoing efforts to undermine the authority of Chairman McMillan, one of the Department Chairmen, by attacks on McMillan's personal character and professional competence. Such efforts included the disparagement of Chairman McMillan by petitioner to the other members of the English Department, University administrators and to prospective candidates for employment by the English Department; accusations that McMillan was "prejudiced" against petitioner because of his political views; and accusations that McMillan discriminated against petitioner because he was a white male.

Among the findings of the faculty hearing committee after the extensive hearing on the Statement of Charges were:

1. That petitioner failed to perform the duties incumbent upon him as a professor.

2. That petitioner conducted himself in such a manner that the efficient functioning of the Department of English was impaired.

3. That petitioner's objections to teaching courses assigned to him, his unsubstantiated interpretation of his contractual obligations, and his judgment that he was better qualified to teach certain courses than his colleagues, constituted a dereliction of the duties of a professor.

4. That petitioner exceeded his rights as a full professor by his repeated demands for special consideration.

5. That petitioner's threats of violence against Chairman McMillan exceeded the prerogatives of any professor.

6. That petitioner "seems to have been so concerned about his personal rights and privileges that he lost sight of his duties and responsibilities."

7. That petitioner was not denied academic freedom nor restricted in the expression of his views; and that his complaints and requests did not deal with important questions of academic life but rather with favors he thought he should be granted because of his rank.

8. That the disruptive conduct of petitioner did, in fact, impair the efficient functioning of the Department of English.

It was upon these acts of misconduct and findings that petitioner's discharge was based. No protected conduct, such as exercise of First Amendment rights, was made the basis of any of the Statement of Charges served on petitioner; and each of the findings made by the faculty hearing committee was based upon unprotected conduct. The hearings clearly revealed that the genesis of petitioner's acrimonious conduct was not his desire to vindicate some public right through the exercise of free speech but purely to obtain for himself preferential treatment in terms of class and course assignments, scheduling, office and classroom assignments, salaries, and other employment conditions.

Such conclusion was obvious to the faculty hearing committee, the Board of Trustees, the District Court and the Court of Appeals, and the decision below in affirming the trial court's opinion is clearly correct.

II.
THERE IS NO CONFLICT OF DECISION

The decision below does not conflict with any decision of this Court, other circuits, or the Alabama Supreme Court, contrary to the allegations of petitioner.

A. *Freedom of Speech.*

No First Amendment issue is present in this case. Often this Court has held that, although a teacher may not be discharged because of his exercise of protected free speech, *Perry v. Sindermann, supra*, the free speech rights of teachers are not absolute, and the question of whether such speech is constitutionally protected necessarily entails striking "a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Arnett v. Kennedy, supra*, quoting *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968); *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274, 284 (1977); *Givhan v. Western Line Consol. School*, 99 S. Ct. 693, 696 (1979). *See Board of Regents v. Roth, supra*, 408 U.S. at 582 (Douglas, J., dissenting) (" 'Whereas a man's right to speak out on this or that may be guaranteed and protected, he can have no imaginable human or constitutional right to remain a member of a university faculty.' ").

In *Mt. Healthy, supra*, this Court recently stated that a teacher may be discharged for cause even if protected free speech played a part in the employer's decision to terminate. 429 U.S. at 285. Otherwise, the Court noted, a teacher whom the employer would have dismissed even if the protected conduct had not occurred, could be placed in a "better position" as a result of constitutionally-protected conduct "than he would have occupied had he done nothing." *Id.*; *Givhan, supra* at 697.

The record in the instant case demonstrates conclusively that: (1) petitioner's discharge was based upon unprotected conduct inimical to the efficient operation of the University's English Department; (2) the University's decision to discharge petitioner was not based even in part upon any

constitutionally-protected conduct* by petitioner; and, cumulatively, (3) the decision to discharge petitioner would have been made even if petitioner had engaged in extensive protected conduct.

B. *Adequate Cause*

There is no conflict concerning the standard of "adequate cause" upon which petitioner was discharged. Such standard has often been held to be constitutionally sufficient against the same charges of overbreadth and vagueness raised by petitioner. *E.g., Arnett v. Kennedy*, 416 U.S. at 159; *Board of Regents v. Roth*, 408 U.S. at 582 ("discharges of employees for 'cause' are permissible"), *citing Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964). As stated in *Arnett v. Kennedy*, because of the "infinite variety" of factual situations in which conduct by employees may justify dismissal for cause, such standard

*Petitioner's argument that his discharge was based upon "private speech" to his employer and colleagues, which private speech is protected under *Givhan, supra*, is without merit. In *Givhan*, the private speech was made by the teacher during the implementation of a desegregation order at the employer-school, in an effort to influence school policies and practices thought by the teacher to be racially discriminatory. In holding that such private speech constituted protected conduct, this Court reemphasized its prior holding in *Pickering v. Board of Education*, 391 U.S. 563 (1968), to the effect that such speech is not protected if it adversely affects the teacher's "working relationship with the objects of his criticism" and destroys "harmony among co-workers", 99 S.Ct. at 696 & n.3, and further held that the termination decision would be permissible if it would have been made regardless of the protected speech, under the *Mt. Healthy* standard. 99 S.Ct. at 697. In the instant case, even assuming that a portion of petitioner's speech was "private", it was aimed at obtaining preferential employment conditions for petitioner, seriously affected not only the working relationships between petitioner and his colleagues but also created severe disharmony among his co-workers, and thus does not approach the type speech protected in *Givhan* or *Pickering*.

describes, "as explicitly as is required," the employee conduct which is ground for removal, and which standard the ordinary person exercising ordinary common sense can sufficiently understand and comply with. 416 U.S. at 159-61.

All of the cases cited by petitioner in this regard are factually and legally dissimilar and do not present any conflict with this Court's opinions cited above.

C. *The Fifth Circuit Rule Is Not Unconstitutional*

Petitioner's claim that the Fifth Circuit rule applied below deprived petitioner of a federal forum and trial by jury, required an exhaustion of state administrative remedies, and improperly restricted the hearing before the District Court, is without merit. None of the numerous cases cited by petitioner in such vein present any conflict with the Fifth Circuit's rule or applicable decisions of this Court.

In *Ferguson v. Thomas*, 430 F.2d 852 (5th Cir. 1970), the Fifth Circuit set out four due process requirements that should be adhered to "within the matrix of the particular circumstances present" when a teacher "who is to be terminated for cause opposes his termination":

> (a) he be advised of the cause or causes for his termination in sufficient detail to fairly enable him to show any error that may exist,
>
> (b) he be advised of the names and the nature of the testimony of witnesses against him,
>
> (c) at a reasonable time after such advice he must be accorded a meaningful opportunity to be heard in his own defense,
>
> (d) that hearing should be before a tribunal that both possesses some academic expertise and has an apparent impartiality toward the hearing.

430 F.2d at 856.

Certainly the *Ferguson* rule is consistent with applicable decisions of this Court. Even though petitioner had a "property interest" protected by the Fourteenth Amendment in his teaching position under state law as a result of the tenure provisions in his contract with the University, *Roth*, 408 U.S. 569-71, and thus was entitled to procedural due process before being discharged*, there still must be determined "what process is due" in the particular context. *Smith v. Organization of Foster Families*, 97 S.Ct. 2111-12 (1972). Ordinarily, before a person is deprived of a protected interest, he must be afforded the opportunity for "some kind of hearing," *id.* at 2112, but the "formality and procedural requisites" for the hearing "can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings." *Roth*, 408 U.S. at 570 n. 7, *quoting Boddie v. Connecticut*, 401 U.S. 371 (1971).

The due process hearing to which a tenured teacher is entitled has never been suggested or required by this Court to comprise anything more than an academic hearing, precisely as afforded petitioner under *Ferguson*. *E.g.*, *Roth*, 408 U.S. at 573 (if a teacher has a right to a hearing, "due process would accord an opportunity to refute the charge before *University officials*") (emphasis added); *Sindermann*, 408 U.S. at 593 (Burger, J., concurring) (teacher who has right to re-employment under state law, also has right under Fourteenth Amendment to "some form of prior administrative or academic hearing"); *id* at 602 (if teacher has protected property interest, "college officials" are obligated to grant a hearing at his request"); *Arnett v. Kennedy*, 416 U.S. at 157 (hearing afforded by "administrative appeal procedures" even after the dismissal is a sufficient compliance with the Due process Clause). Petitioner raises

*Such conclusion was assumed by the Court of Appeals below without discussion.

no issues relating to the notice (provided by the Statement of Charges) of the causes for the discharge and the names of witnesses and nature of their testimony.

Without question, the *Ferguson* - based hearing provided petitioner in this case, replete with the right to cross-examination, arguments and briefs, exceeds the minimum due process standards set forth by this Court*, and petitioner sets forth no conflict between that hearing procedure and any decision of this Court.

The thrust of petitioner's argument appears to be that there should have been a judicial determination of the merits of his termination for "cause", in a plenary trial and by a jury. Such an argument, if accepted, would result in the possibility of an extended federal inquiry into whether "adequate cause" existed for the discharge of a public employee after each such discharge — a result clearly not intended under the First or Fourteenth Amendments. As stated in *Bishop v. Wood, supra*, where this Court recently refused to require the reinstatement of a policeman dismissed without a hearing and who claimed the *reasons* for his discharge were false:

*Compare *Arnett, supra* (discharged employee need not be afforded full panoply of rights he would have in trial-type adversary hearing); *Memphis Light, Gas and Water Division v. Craft*, 98 S.Ct. 1554, 155 (1978) (customer complaining of overcharge need be provided only an opportunity for presentation to designated employee of utility company of complaint); *Hortonville Joint School District v. Hortonville Education Association*, 426 U.S. 482 (1976). In *Hortonville*, this Court held that teachers who had been discharged by a school board for engaging in a strike which was prohibited by state law were not entitled to a hearing on the decision to discharge them by any body other than the school board, even though the school board had been active in the strike negotiations and possibly harboured some personnel bitterness toward the teachers.

> The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made by public agencies. (426 U.S. at 349).

The merits of a claim that the discharge was based upon constitutionally - protected conduct, of course, are properly before the federal court, and this Court in *Mt. Healthy* recently set forth the procedure to be followed when such a claim is presented, as follows:

> Initially . . . the burden was properly placed upon respondent [the teacher] to show that his conduct was constitutionally protected, and that this conduct was a "substantial factor" — or to put it in other words, that it was a "motivating factor" in the Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board has shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct. (429 U.S. at 287).

This same *Mt. Healthy* procedure is contained in *Ferguson v. Thomas*, which could be said to have presaged the *Mt. Healthy* test:

> If the instructor challenges his termination on grounds that his constitutional rights have been infringed, a decision on that claim may and should be avoided *if valid non-discriminatory grounds are shown to have been the basis of the institution's action.* (430 F.2d at 858-59) (emphasis added).

By granting the University's motion for summary judgment under the *Ferguson* standard, the District Court was convinced that no alleged protected conduct played any part in petitioner's discharge and that "valid nondiscriminatory" or unprotected grounds had been shown to have

been the basis for petitioner's discharge, as required by *Mt. Healthy*. Rarely is a district court aided with such an extensive record as was compiled in the instant case. Among the documents before it were the 24-page Statement of Charges; the transcript of the meetings conducted to select a faculty hearing committee; the transcript of the 14 hearing sessions held by that committee containing, *inter alia*, the testimony of 12 witnesses (direct and cross examination) and a total of 163 exhibits submitted by the parties; the 12-page report of the faculty hearing committee whose recommendation that petitioner be discharged was appealed to the Board of Trustees; the transcript of the proceedings before the Board of Trustees (including the oral argument of petitioner and counsel); and the 46-page report of the Board of Trustees which reached the same conclusion reached by the faculty hearing committee. That record contains all of the allegations made by petitioner herein that his discharge was due to protected conduct and evidence profferred by petitioner in support thereof, together with all of the evidence profferred by respondents both in rebuttal of such allegations and in support of the grounds for discharge specified in "painstaking detail" in the Statement of Charges (A3). Based upon that record, which was independently reviewed by the District Court (A14) and Court of Appeals (A5), both courts clearly concluded that the University's decision to discharge petitioner was based solely upon his failure to perform assigned duties and his conduct inimical to the efficient functioning of the Department of English, and that his discharge was "in accordance with constitutional standards" and "in full compliance with the procedural and substantive due process standards" of the Fourteenth Amendment (A14-15). Such conclusion reached under the *Ferguson* standard comports fully with applicable decisions of this Court.

Petitioner's correlative claim that he was denied a federal forum and trial by jury under the *Ferguson* standard as applied herein, boils down to a claim that the District Court should not have granted summary judgment, which claim is simply unfounded in view of the extensive record before the District Court demonstrating that petitioner was discharged for "adequate cause" and not because he engaged in any constitutionally-protected activity.

Contrary to petitioner's further claim, the *Ferguson* procedure as applied herein does not require any "exhaustion" of "state administrative remedies." When the District Court determined in 1974 that the first notice and academic hearing afforded petitioner did not comport with procedural due process standards, petitioner became entitled to a sufficient due process hearing as a matter of law. *Sindermann, supra* at 602 (proof by teacher-respondent of a property interest in continued employment would not entitle him to reinstatement, but would "obligate college officials to grant a hearing at his request"); *Roth, supra*. The District Court's remand for such a hearing cannot be viewed as an exhaustion of state administrative remedies requirement. In *Roth*, this Court held that the respondent professor there had no property interest in his job under state law and therefore no due process right to a hearing prior to the decision being made not to rehire him. The district court had stayed proceedings in that case on the independent question of whether the decision not to rehire Roth was based on his free speech activities. 408 U.S. at 574-75. Mr. Justice Douglas dissented from the majority opinion on the sole ground that the allegation itself by Roth that the decision not to rehire him was based upon free speech rights required the University to afford him a hearing and reasons for its action (even though Roth had no *property* interest entitling him to a hearing under the majority opinion). Justice Douglas approved of the practice in such cases that the District Court stay the pending §1983 action until the academic notice and hearing had been completed, stating that:

> Such a procedure would *not* be contrary to the well-settled rule that §1983 actions do not require exhaustion of other remedies. (408 U.S. at 586 & n. 1a) (emphasis added).

Such a stay pending completion of the academic hearing was thought by Mr. Justice Douglas to be a permissible course for district courts to take, "though it does not relieve them of the final determination" whether nonrenewal of the teacher's contract was due to the exercise of First Amendment rights, since:

> "School-constituted review bodies are the most appropriate forums for initially determining issues of this type, both for the convenience of the parties and in order to bring academic expertise to bear in resolving the nice issues of administrative discipline, teacher competence and school policy, which so frequently must be balanced in reaching a proper d termination." (407 U.S. at 586).*

The courts of appeal agree that in such cases, where a due process hearing is required and a First Amendment claim is pending, a referral of the matter to the institution for a final (or repeated) due process hearing to insure that the matter is ripe for adjudication, presents no conflict with the exhaustion rule in §1983 actions. *Stevenson v. Board of Education*, 426 F.2d 1154, 1157 (5th Cir.), *cert. denied*,

*In a similar vein, this Court has held that the absention doctrine is applicable in §1983 actions where the question of whether a sufficient property interest exists to support a claim for a due process hearing requires resort to state courts. *Boehning v. Indiana State Employees Association*, 423 U.S. 6 (1975); *Perry v. Sindermann, supra* at 593 (Burger, C.J., concurring).

400 U.S. 957 (1970); *Raper v. Lucey*, 488 F.2d 748, 751 n.3 (1st Cir. 1973); *Fuentes v. Roher*, 519 F.2d 379, 386-89, 391 (2d Cir. 1975) (court ordered second procedural due process hearing in case where teacher, who was suspended but who continued to receive his salary pending completion of hearings, challenged the suspension on free speech grounds); *Tony v. Reagan*, 467 F.2d 953, 956 (9th Cir. 1972), *cert. denied*, 93 S.Ct. 951 (1973) (non-tenured professor who challenged on First Amendment grounds school decision not to rehire him was required to exhaust grievance procedure while district court retained jurisdiction to hear the cause on the merits after completion of the hearing).

An additional reason exists in this case to demonstrate the nonexistence of any exhaustion requirement herein. After the first faculty hearing in 1972, petitioner sought and received full and immediate access to a federal forum, in which he obtained a ruling that he had been denied procedural due process rights in connection with his discharge (A 8). The remedies he received were among the ones he sought, (1) a remand of the case to the University for a second hearing to be conducted pursuant to the *Ferguson* standard; and (2) back pay relief equal to his salary upon termination together with an injunction requiring that he be paid his salary until final disposition of the case by the University (A 9-10), a remedy equivalent to reinstatement without the obligation on the part of petitioner to perform any duties pending the rehearing.

No "exhaustion" requirement is present, therefore, because the "state administrative remedy," in this case being the second faculty hearing, constitutes one of the very *remedies awarded* by the District Court which was sought by petitioner and to which he was entitled under *Roth*. The additional remedies afforded him, back pay and a continuation of his salary, further demonstrate that no exhaustion requirement was imposed by the District Court.

Petitioner's further attack on *Ferguson*, that the district court's role in such a discharge case is improperly "limited" to whether or not the procedure followed by the defendants comported with due process requirements, fails to comprehend the distinction between (1) the procedural due process hearing, and (2) the question whether the discharge was based upon protected conduct. The limited review requirement applies only in cases where the discharged employee claims only a denial of procedural due process in connection with his discharge. In such cases, the limited review requirement is necessary to avoid prolonged federal trials over whether sufficient cause existed for an employee's discharge. *Bishop v. Wood, supra*; *cf., Board of Curators v. Horowitz*, 98 S.Ct. 948, 956 (1978) ("Courts are particularly ill-equipped to evaluate academic performance."). If the employee claims that his discharge was due to protected conduct, the *Ferguson* decision, as quoted above, clearly requires the District Court to ascertain whether the discharge was in fact due to valid, unprotected conduct. 430 F.2d at 858-59; *accord, Mt. Healthy, supra*. Nothing in *Ferguson* diminishes the right of any discharged employee to prove he was discharged for conduct protected by Constitutional guarantees.* The District Court in this action had before it all of the evidence presented to the faculty hearing committee, the findings of that committee and the report of the Board of Trustees with which to determine the constitutional validity of the grounds for petition-

**Viverette v. Lurleen B. Wallace Jr. College*, 587 F.2d 191 (5th Cir. 1979), the case petitioner relies upon as depicting the *Ferguson* procedure, is distinguished by the fact that no claim was made therein by Viverette that he had been discharged due to protected conduct. His sole claim was that he had been discharged without adequate cause and was thereby denied due process rights.

er's discharge. That evidence is clear that none of the grounds upon which petitioner's discharge was premised were constitutionally impermissible.

D. *There Is No Conflict With the Alabama Supreme Court*

Petitioner's argument that the decision below conflicts with *State Tenure Commission v. Madison County Board of Education*, 282 Ala. 658, 213 So. 2d 823 (1968) is misplaced. *Madison County* is distinguishable by the existence of a state statutory procedure in that case governing the discharge of tenured teachers, which specified the permissible grounds for discharge and provided for an administrative appeal procedure through a State Tenure Commission followed by a review by petition of mandamus filed in the circuit court. State statutes affording more due process-type protections to teachers than otherwise available under federal standards are certainly permissible under *Roth, supra*, but the factual findings made in a case like *Madison County* are clearly not germane to the instant case in which no such statutes are applicable.*

E. *There Is No Conflict Between The Circuits*

Petitioner cites no cases which disclose any conflict between the decision below and any of the other courts of appeal. All of the cases cited by petitioner in such vein are predicated on different facts and set forth no principle of decision in conflict with the decision below.

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*Had *Madison County* been decided under federal standards, the circuit court's finding there, that certain of the grounds for the discharge were proved (and thus presumably that the teacher would have been discharged but for lack of proof of other grounds), would have probably been sufficient under *Mt. Healthy, supra.*

III.
NO QUESTION OF IMPORTANCE IS PRESENTED

This is a case where, based upon independent reviews of an exhaustive record of several thousand pages, two administrative bodies and two federal courts are unanimous in their opinions that petitioner was discharged for sufficient cause based solely upon unprotected conduct. Petitioner insists that somewhere in such opinions lurks an important question of federal law which this Court should settle. Strangely, there is no citation to any pending litigation and no indication of any conflict between relevant opinions of this Court or other courts, but only the omission of any reference to the seminal cases of this Court most relevant to the instant matter. Had *Roth, Sindermann, Arnett, Bishop* and *Mt. Healthy* not been decided by this Court, there doubtless would be questions of importance to be decided herein. But in those cases this Court has laid to rest all of the questions pertinent to the instant matter and absolutely no conflict between those cases and the decision below is disclosed by the petition.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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